

WEE POCO & CO., INC., PLAINTIFF AND APPELLANT, VS. JUAN POSADAS, JR., COLLECTOR OF INTERNAL REVENUE, DEFENDANT AND APPELLEE.

G. R. No. 43142. August 26, 1937

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

This is an appeal taken from the judgment rendered by the Court of First Instance of Zamboanga, dismissing the complaint filed therein by the herein appellant Wee Poco & Co., Inc., otherwise known in said locality by the name of Chin Tay & Company.

The complaint contained three causes of action. Under the first cause of action, the plaintiff sought of the defendant-appellee Collector of Internal Revenue the refund of the sum of P705 collected by way of execution, which represented the proceeds of the sale of certain properties belonging to the plaintiff to enforce payment of the sum of P2,155.14 demanded of it as merchant's tax on alleged shipments of goods made from Zamboanga to Hoc Chuan Tay in Cotabato, from January, 1925, to August, 1926. In said first cause of action, the plaintiff likewise demanded payment of the sum of P1,295 as damages from the sale of its distrained properties for P705 which properties, it is alleged, were worth not less than P2,000. In the second cause of action, said plaintiff demanded the refund of the sum of P1,450.14 paid by it under protest, which represented the balance of said tax of P2,156.14, after the distrained properties of the plaintiff had been sold for P705. In the third cause of action, the plaintiff demanded the refund of the sums of P1,996.97 and P485.20 paid by it under protest as merchant's tax and additional tax, respectively, asking later for the return of both sums amounting to P2,482.17. Said taxes had been demanded of the plaintiff for alleged sales of merchandise worth P59,169.35 which, according to the defendant, had been sent by the former from Zamboanga to Hoc Chuan Tay in Cotabato in the year 1924.

The appellant assigns in its brief seven alleged errors claimed by it to have been committed by the court a quo, and the defendant-appellee, in refuting them, first raises the question that the appellant is not entitled to demand the refund of the sum of P705 (1st cause of action), nor that of P1,450.14 (2d cause of action), for the reason that the former sum was not paid under protest and the refund of both sums was not requested of the defendant before the filing of the complaint.

Section 1579 of the Administrative Code, as amended by Act No. 3685, provides as follows:

"When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property the same is sought to be enforced shall pay the tax under instant protest, or upon protest within thirty days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after the payment of the tax to bring an action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."

From the foregoing quotation it is inferred that the fulfillment of two conditions is required before a complaint may be filed for the recovery of the amount paid for the tax in question, to wit: (1) that the protest be made at the time the tax is paid, or within thirty days subsequent thereto, and (2) that the taxpayer request the decision of the Collector of Internal Revenue.

"PROTEST.—The spontaneous declaration made to acquire or keep some right or to prevent an impending damage." (9 Alcobilla, Diccionario de la Adntinistracion Espanola, page 95.)

"PAYMENT UNDER PROTEST.—One who is called upon to pay an import duty, a tax, subscription, or the like, which he thinks he ought not to be required to pay, but is unwilling to encounter the delay and expense of a lawsuit at that time, pays the sum demanded under protest; * * * (6 Words & Phrases Judicially Defined, page 5745.)

Well then: as to the first cause of action, this court is of the opinion that the requisite of protest can not be demanded with respect to the payment of the sum of P705 on the ground that said sum was not paid directly by the plaintiff corporation, but the collection thereof was effected by the attachment and sale at public auction of some properties belonging to the corporation. It should be noted, however, that the attachment was protested by the plaintiff. Furthermore, inasmuch as the sum of P1,450.14 referred to in the second cause of action, which, together with the sum of P705, completes that of P2,155.14, the total amount of the tax charged and levied on the value of the merchandise allegedly shipped by the plaintiff to Hoc Chuan Tay in Cotabato from January, 1925, to August, 1926, was paid under protest, the protest under these circumstances should be considered to have been made against the payment of the total amount of P2,155.14.

However, the Collector of Internal Revenue contends that the plaintiff not only should have made the payment under protest but should have also demanded of him the refund of the sums referred to in the first and second causes of action, concluding that as it had failed to do so, the present action does not lie.

This court is of the opinion that the contention of the Collector of Internal Revenue is fundamentally supported by law. It has already been seen above that according to section 1579 of the Administrative Code, the law requires two conditions precedent to the filing of an action for the recovery of a tax paid, to wit: the protest and the request to the Collector of Internal Revenue to render his decision. The law has not prescribed these requisites giving the taxpayer the right to choose one or any of the two for compliance therewith, it being presumed that the legislator in requiring them had some purpose in mind, and in fact each of said requisites serves a purpose. The protest is to notify the collector of the taxpayer's nonconformity to the payment of the tax demanded of him. Without the protest, the taxpayer would have no right to demand the refund of the tax paid, as he would be understood to have paid it voluntarily (*Fernandez vs. Shearer*, 19 Phil., 75). However, the protest is not sufficient. The law requires the taxpayer to request the decision of the collector, and such requirement is not merely directory but clearly mandatory, as may be inferred from the words: "and shall thereupon request the decision of the Collector of Internal Revenue." One objection might be interposed herein if we take into consideration what this court stated in the case of *onso* (46 Phil., 159, 161), to wit:

"Inasmuch as a rule has been established for years in this jurisdiction that a mere protest of record against the payment of an illegal demand, is sufficient to constitute an involuntary payment, and justifies an action for its recovery, we find no reason for invoking the doctrine announced in other jurisdictions."

However, it is not inferred from the above-quoted doctrine that the protest is the only requisite to be complied with in order to place the taxpayer in a position to bring an action against the government. The question whether or not the taxpayer, before filing his complaint, should request the decision of the Collector of Internal Revenue, has neither been raised nor expressly discussed in said case. Neither is it inferable therefrom that said second requisite is unnecessary because it has been held therein that a mere protest is sufficient, for we should not lose

sight of the fact that the above-quoted ruling of this court is the conclusion arrived at by it after passing upon the question raised by the appellant, to wit: "whether or not the payment of same license fees under a mere protest of record is equivalent to an involuntary payment in this jurisdiction, and justifies the bringing of an action for the recovery thereof." That was the only question decided by this court, that is, whether or not a mere protest of record is sufficient to constitute an involuntary payment.

Taking now into consideration that the protest is entered for the sole purpose of preserving the taxpayer's right to question the legality of the tax, hence the necessity of later requesting the decision of the Collector of Internal Revenue, and in order that said official may have an opportunity to render a decision with knowledge of the facts of the case, the taxpayer must state in his petition his reasons for questioning the legality of the tax and for demanding the refund of the amount paid by him. Otherwise, if the protest were the only legal condition required by the law, or were sufficient to require the Collector of Internal Revenue to decide the question, we would be imposing upon him a duty impossible to comply with, inasmuch as, with the mere protest which does not specify the grounds thereof, the collector would not know what the taxpayer had in mind when he formulated the same.

The Collector of Internal Revenue, however, does not claim that the appellant should have requested his decision but, according to him, he should have asked for the refund of the sums paid by him under protest. In the last analysis and by their purpose, both requisites are one and the same thing. Section 1579 of the Administrative Code does not require the taxpayer to request the refund of the amount paid as tax but the decision of the collector. The petition for refund is a necessary prerequisite in the United States. There, before the taxpayer can institute a suit for the recovery of a tax, he must appeal to the Commissioner of Internal Revenue so that the latter may decide the question of refund (Rev. Stats., sec. 3226; *New York Mail & Newspaper Transp. Co. vs. Anderson* [1916], 234 Fed., 590; *State Line & S. R. Co. vs. Davis* [1915], 228 Fed., 246; *Merck vs. Treat* [1909], 174 Fed., 388 and others). The requirement of the decision of the Collector of Internal Revenue, demanded in the Philippines, is patterned after the requisite demanded in section 3226 of the Revised Statutes of the United States relative to the appeal or claim for refund addressed to the Commissioner of Internal Revenue, as the decision of the Collector of Internal Revenue required herein in the end has to refer necessarily to the refund of the amount paid by the taxpayer under protest.

In the present case, there is no evidence of record to the effect that before the filing of the complaint, the appellant had requested of the defendant the refund of the sums stated in the first and second causes of action, or the defendant's decision, after it had made its protest. Failure to comply with this requisite is fatal because it has been repeatedly held that no action for the recovery of a tax paid can be maintained without strictly complying with each and every one of the conditions required by the law to that effect.

"It is settled beyond controversy that the State, which in the eye of the law is recognized as a sovereign, cannot without its consent be sued by a citizen. In case the State, through its legislative department, has granted the right or privilege to claimants to institute actions against it upon certain terms and conditions, all persons seeking to avail themselves of the privilege so granted must accept it subject to the terms and conditions attached thereto or forming part of the right as granted by the State." (Underscoring ours.) (*State vs. Mutual Life Ins. Co.*, 175 Ind., 59, 71.)

"Statutes permitting the state to be sued are in derogation of its sovereignty and will be strictly construed." (Underscoring ours.) (*Miller vs. Pillsbury*, 128 Pac., 327; and *Western & Atlantic R. Co. vs. State of Georgia*, 14 L. R. A., 438.)

"Before a suit can be commenced to recover taxes erroneously or illegally assessed or collected, * * * an appeal must be made to and a decision rendered by the Commissioner of Internal Revenue." (Underscoring ours.) (*Holmes, Federal Taxes*, p. 615; *Id.*, 6th ed., p. 1531.)

"In a recent case the Supreme Court has decided that a claim for refund is necessary as a prerequisite to recovery in the courts, * * *." (Underscoring ours.) (Holmes, Fed. Taxes, 1921 Supplement, p. 333.)

In this jurisdiction, this court has declared:

"It appears from the record that the plaintiffs not only neglected and failed to take the proceedings required by law for the protection of their interests but also without protest or objection of any kind paid the taxes which they now seek to recover. * * * Not having taken the steps required by law for the protection of their interests, the action can not be maintained." (Underscoring ours.) (Fernandez vs. Shearer, 19 Phil., 75, 78.)

"The power to tax necessarily carries with it the power to collect the taxes. This being true, the weight of authority supports the proposition that the government may fix the conditions upon which it will consent to litigate the validity of its original taxes." (Underscoring ours.) (Churchill and Tait vs. Rafferty, 32 Phil., 580, 592.)

"In its final analysis, the letter of April first should be construed as a polite and courteous demand and request for the refund of the tax in question, to be paid at such time as the correct amount was ascertained and determined." (Underscoring ours.) (Asiatic Petroleum Co. vs. Posadas, 52 Phil., 728, 743.)

Inasmuch as the plaintiff has not strictly complied with the provisions of section 1579 of the Administrative Code, as amended, it is not entitled to recover the sums paid as merchant's tax referred to in the first and second causes of action of its amended complaint.

With respect to the sum of P1,295, claimed as damages in the first cause of action, no evidence has been adduced by the plaintiff in support of said claim. The court, in its judgment, has made no reference thereto and the plaintiff itself has made no assignment of error on this point.

With respect to the third cause of action, it has been established and the appellee admits that the plaintiff paid under protest the sum of P2,482.17, and asked of the defendant-appellee for the refund thereof.

The defendant demanded payment and collected the sum of P1,996.97, together with P485.20, or a total amount of P2,482.17, as merchant's tax on merchandise claimed by him to have been sold and shipped by the plaintiff to Hoc Chuan Tay in Cotabato in the year 1924. It is admitted by the defendant in his brief that of the sum of P2,482.17 in question, he should and is willing to refund ₱246.59.

The evidence shows that Hoc Tay Chan was a branch of the plaintiff in Cotabato. The license for said branch was obtained and paid for on April 19, 1924, in the name of the plaintiff because the latter was the owner of the merchandise sold in the store named Hoc Tay Chan. The license was renewed in 1925 and the business was continued until July 31, 1925, when the plaintiff closed said store, keeping the merchandise left therein in the upper floor of the building occupied by it in Cotabato up to the time said merchandise was combined with that of Hoc Chuan Tay, another branch of said plaintiff. For the sales made by the plaintiff in said branch named Hoc Tay Chan, it paid the taxes corresponding to the second, third and fourth quarters of 1924 and to the first and second quarters of 1925.

The defendant, in demanding of the plaintiff the payment of the sum the refund of which is sought in the third cause of action, mistook the plaintiff's branch Hoc Tay Chan for the firm Hoc Chuan Tay. The evidence, however, affords no room for doubt that Hoc Tay Chan is a branch different from Hoc Chuan Tay. Included in the evidence presented by the plaintiff are Exhibit BBB, page 281, and Exhibit BBB, page 282; of the bundle of exhibits. Exhibit BBB (page 281) is an information dated October 23, 1931, for estafa through falsification of mercantile documents, filed in the Court of First Instance of Zamboanga against Dalmacio Wee Guevara, manager of the plaintiff corporation, alleging that said Guevara had falsified a book of account by inserting therein the words

"Wee Poco & Co., Branch" with a view to defrauding the government in the payment of the tax of P2,155.14 (1st cause of action). Exhibit BBB (page 282) is the judgment rendered on April 19, 1932, that is, after the complaint in this case had already been filed, acquitting the accused and making a statement of facts as follows:

"That Wee Poco & Co., Inc. (the herein plaintiff and appellant) began to operate in Zamboanga prior to July 11, 1924, and in the course of its business, it established a branch in the municipality of Cotabato of the Province of the same name, which branch was known by the name of Hoc Tay Chan; that about said date, July 11, 1924, another firm Hoc Chuan Tay was likewise established in Cotabato, said firm Hoc Chuan Tay having been constituted by the majority of the partners or capitalists of Wee Poco & Co., Inc. * * *." (Underscoring ours.)

There is no room for doubt that Hoc Tay Chan was a branch of the plaintiff-appellant for the transactions of which the latter paid not only the license but also the merchant's tax.

The appellee contends that the judgment rendered in the case against Guevara is inadmissible as evidence in the present case. But if it is taken into consideration that Guevara was charged in said case as manager, and for being manager of the herein plaintiff-appellant Wee Poco & Co., Inc., precisely in connection with a book of account in which the falsification is alleged to have been committed for the purpose of defrauding the government in the payment of the tax the refund of which is the subject matter of the first cause of action; if it is taken into consideration that the prosecution was conducted by the government with the continuous collaboration and help of the agents of the herein defendant, Collector of Internal Revenue, so that in fact and in truth the real parties in said criminal case are the same as in this case, the facts involved in both cases being, on the other hand, identical, this court is of the opinion that the judgment rendered in said other case is perfectly admissible in this case.

"A record in a criminal action cannot be admitted in a civil action except by way of inducement or to show a collateral fact. The rule might be different if the party in the civil action had control over the proceedings in the criminal action as by showing that the party in the civil action supplied the lawyer for the accused in the criminal action." (Underscoring ours.) (City of Manila vs. Manila Electric Co., 52 Phil., 586.)

"It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he was a stranger; but the converse of this rule is equally true, that by proceedings to which he was not a stranger he may well be held bound. Under the term parties, in this connection, the law includes all who are directly interested in the subject matter, and had a right to make defense, or to control the proceedings, and to appeal from the judgment." (Underscoring ours.) (1 Greenleaf, 7th ed., p. 656.)

"Judgments, whatever, are conclusive proof, as against all persons, of the existence of that state of things which they actually effect, when the existence of the state of things so effected is a fact in issue, or is, or is deemed to be, relevant to the issue." (Steph. Ev., art. 40; Dorrell vs. State, 85 Ind., 357.)

For all the foregoing, the judgment is affirmed as to the first and second causes of action, and reversed as to the third, and by virtue thereof, the appellee is ordered to refund to the appellant, without interest, the sum of P2,235.58. The appealed judgment is likewise affirmed in so far as it orders the defendant to return to the plaintiff the sum of P246.59, without special pronouncement as to the costs. So ordered.

Avancena, C. J., and Abad Santos, J., concur.

CONCURRING

LAUREL, J.,

In view of the sharp conflict of opinions of the members of this court on the important question presented in this case, I wish to state my reasons for concurring in the result arrived at by my three assenting brethren.

The facts are related in the preceding opinion and need not be repeated for the purpose of this concurrence. In the first two causes of action mentioned, it is admitted that no ruling of the Collector of Internal Revenue was requested or had on the protest against the payment of the taxes alleged to have been illegally or improperly collected. The question, in my opinion, is whether this requirement of the law is mandatory. Probably the auxiliary verb "shall" is an indication of the mandatory character of the law, but as this is not decisive, further inquiry is advisable. Section 1579 of the Revised Administrative Code provides as follows:

"SEC. 1579. Recovery of the tax paid under protest.— When the validity of any tax is questioned, or its amount disputed or other question raised as to liability therefor, the person against whom or against whose property the same is sought to be enforced shall pay the tax under instant protest, or upon protest within thirty days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after the payment of the tax to bring an action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax." (Underlining is mine.)

That the intention of the legislature is what to me appears clearly stated in section 1579 of the Revised Administrative Code is apparent from an examination of the sources of this section. The original Internal Revenue Law is Act No. 1189 of the Philippine Commission, enacted on July 2, 1904, and which took effect on August first of that same year. It was known as "The Internal Revenue Law of 1904." It was intended to supplant the old Spanish laws on the subject and, in the language of the Philippine Commission, "it abolished the great majority of the Spanish industrial taxes, which were so adjusted as to fall most heavily upon the poorer classes and permitted the larger merchants, manufacturers, and business men to escape with comparatively little taxation" (Sixth Annual Report of the Philippine Commission [1905], p. 64). Act No. 1189 was patterned after the Internal Revenue Law then in force in the United States and which at the time was the Act of Congress of July 13, 1866 (14 Stat. at L., ch. 184, p. 152) as amended by the Act of June 6, 1872 (17 Stat. at L., ch. 315, p. 257).

Section 19 of the first Act (July 13, 1866) is as follows:

"SEC. 19. And be it further enacted, That no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the commissioner of internal revenue according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect: Provided, That if said decision shall be delayed more than six months from the date of such appeal, then said suit may be brought at any time within twelve months from the date of such appeal." (14 U. S. Stat. at L., ch. 184, p. 152.) (Underlining is mine.)

Section 44 of the Act of Congress of June 6, 1872, amendatory to section 19 above-quoted of the Act of Congress of July 13, 1866, is as follows:

"SEC. 44. That all suits and proceedings for the recovery of any internal tax alleged to have been erroneously assessed or collected, or any penalty claimed to have been collected without authority, or for any sum which it is alleged was excessive, or in any manner wrongfully collected, shall be brought within two years next after the cause of action accrued and not after; and all claims for the refunding of any internal tax or penalty shall be

presented to the commissioner of internal revenue within two years next after the cause of action accrued and not after: Provided, That actions for claims, which have accrued prior to the passage of this act, shall be commenced in the courts or presented to the commissioner of internal revenue within one year from the date of said passage: And provided further, That where a claim shall be pending before said commissioner the claimant may bring his action within one year after such decision and not after: And provided further, That no right of action barred by any statute now in force shall be revived by any thing herein contained." (17 U. S. Stat. at L., ch. 315, pp. 257, 258.) (Underlining is mine.)

It should be observed that section 44 of the Act of Congress of June 6, 1872 was finally amended by section 1103 of the Act of June 6, 1932, thus:

"SEC. 1103. Limitations on Suits by Taxpayers.

"(a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows;

" 'SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

"(b) Suits or proceedings instituted before the date of the enactment of this Act shall not be affected by the amendment made by subsection (a) of this section to section 3226 of the Revised Statutes. In the case of suits or proceedings instituted on or after the date of the enactment of this Act where the part of the claim to which such suit or proceeding relates was disallowed before the date of the enactment of this Act, the statute of limitations shall be the same as provided by such section 3226 before its amendment by subsection (a) of this section." (47 U. S. Stat. at L., ch. 209, p. 286.) (Underlining is mine.)

Section 52 of Act No. 1189 of the Philippine Commission, taken from section 19 of the Act of Congress of July 13, 1866, as amended, reads:

"SEC. 52. No suit shall be maintained in any court for the recovery of any internal revenue tax alleged to be excessive or collected without authority or of any sum alleged to be excessive or in any manner wrongfully collected, unless protest against such tax was made at the time of the payment thereof or within ten days thereafter nor until appeal shall have been duly made to the Collector of Internal Revenue and his decision has been had thereon: Provided, That if such decision is delayed six months from the date of appeal then the suit may be brought without first having the decision of the Collector of internal Revenue and provided further, That no suit shall be maintained in any court for such recovery unless the same is brought within two years next after the cause of action accrued: And provided further, That no courts shall have authority to grant an injunction restraining the collection of any taxes imposed by virtue of the provisions of this Act, but the remedy of the taxpayer who claims that he is unjustly assessed or taxed shall be by payment under protest of the sum claimed from him by the Collector of Internal Revenue and by action to recover back the sum claimed to have been illegally collected." (Underlining is mine.)

About ten years after the approval of Act No. 1189, said Act and its amendments were revised and compiled and the result was the enactment of Act No. 2339, otherwise known as "The Internal Revenue Act of 1914." Section

140 of this Act is as follows:

"SEC. 140. Recovery of tax paid under protest.—When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property the same is sought to be enforced shall pay the tax under instant protest, or upon protest within ten days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after the payment of the tax, to bring an action against the Collector of Internal Revenue for the recovery of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax." (Underlining is mine.)

Upon the codification of the political laws of the Philippines, section 140 quoted above was incorporated as section 1721 of the Administrative Code of 1916 and finally as section 1579 of the Administrative Code of 1917 which section, as amended by Act No. 3685 (approved November 6, 1930), is inserted in the beginning of this opinion.

It should be observed that under the provisions of section 52 of the original Act No. 1189 of the Philippine Commission, no suit for the recovery of any internal-revenue tax was permitted "unless protest against such tax was made at the time of the payment thereof or within ten days thereafter nor until appeal shall have been duly made to the Collector of Internal Revenue and his decision has been had thereon." The requirement in the original section 52 of Act No. 1189 pertaining to appeal and the decision thereon of the Collector of Internal Revenue is the same requirement found in the original section of the Act of Congress of July 13, 1866. As incorporated in section 140 of Act No. 2339, section 52 of Act No. 1189 has remained substantially the same, except in so far as it refers to the appeal. The change was more in phraseology than in substance, at least on the point that presently concerns us. Whereas section 52 (Act No. 1189) requires "protest against such tax * * * at the time of the payment thereof," section 140 (Act No. 2339) requires payment "under instant protest"; and, whereas the former section and law provide that no "suit shall be maintained * * * until appeal shall have been duly made to the Collector of Internal Revenue and his decision has been had thereon," the latter section and law provide that the taxpayer "shall thereupon request the decision of the Collector of Internal Revenue." As indicated, section 140 of Act No. 2339 was incorporated as section 1721 of the Administrative Code of 1916 without any change; and section 1721 was afterwards incorporated as section 1579 of the Revised Administrative Code of 1917 without any change either.

From the history of section 1579 of the Revised Administrative Code briefly outlined above, it seems clear that the unequivocal intention of the legislature was to make the two conditions above-mentioned conditions precedent to the bringing of a suit by a taxpayer for the recovery of a tax alleged to have been illegally or improperly collected. It is true that under section 3226 of the Revised Statutes of the United States—as now worded—no protest is required, and to permit the institution of an action thereunder for the recovery of a tax it is sufficient that "a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue"—with or without protest—but this fact is more an argument in support of the view taken by the majority for it shows that, in the opinion of Congress, claim for refund, if not equivalent to protest, is more important than protest itself. As correctly observed in the preceding opinion of the majority, request for decision on the protest could have no other purpose than the refund of the tax. It is, indeed, inconceivable that the taxpayer would ask the Collector of Internal Revenue to reject his protest and confirm collection. In my opinion, also, when the internal-revenue system was implanted here, it was thought advisable to insert the generally accepted principle in the law of taxation that taxes voluntarily paid cannot be recovered (26 R. C. L.; p. 459 and authorities therein cited) and hence it was deemed expedient to require—as it has been required since the approval of the original Philippine

Internal Revenue Law of 1904—payment under protest and, in addition, the decision thereon by the Collector of Internal Revenue.

Several decisions heretofore rendered by this court might have given the impression that to initiate a suit for the recovery of a tax alleged to have been unduly or illegally collected payment under protest was sufficient (See, for instance, *Bank of the Philippine Islands vs. Trinidad*, 42 Phil., statement of facts on p. 220; *Ayala de Roxas vs. City of Manila*, 27 Phil., 336, 346 [involving real property tax]; and cases cited in *Viuda e Hijos de Pedro P. Roxas vs. Rafferty*, 37 Phil., 957). An examination, however, of these cases will show that the question presently under consideration has not been directly presented, was not the *lis mota* there, and that the cases were therefore decided *silenter* on the question which is now submitted for the first time for determination by this court.

Coming to the fundamentals, it should be observed that taxation is an essential attribute of sovereignty. It is said to be the greatest of all governmental powers, so ever-pervading and insistent that, according to Chief Justice Marshall of the Supreme Court of the United States, the power to tax involves the power to destroy (*M'Culloch vs. State of Maryland*, 4 Wheat., 316; 4 Law. ed., 579). So overwhelming is this power that injunction is not available to restrain the collection of a tax (sec. 1578, Adm. Code; *Sarasola vs. Trinidad*, 40 Phil., 252); the power to collect taxes is not barred by a general statute of limitations (26 R. C. L., 388); the right to collect delinquent taxes is not affected by the passage of an Act repealing the statute under which said taxes were assessed and levied, in the absence of legislative intent to the contrary (*Cooley, Taxation*, pp18, 19, 295) ; even in case of recovery, interest is not awarded against the government; and, where the state permits suits to be brought against it for the recovery of taxes, as in our case, the remedy provided is exclusive and no other remedy can be substituted for it (*Snyder vs. Marks*, 109 U. S., 189. See also, *Churchill and Tait vs. Rafferty*, 32 Phil., 580, 587, and *Sarasola vs. Trinidad*, 40 Phil., 252, 257). In the exercise of its power of sovereignty, the State consents to be sued as an expression of public policy. In such a case, the power of the State and the remedy of the citizen are made reciprocal and the judiciary is made the arbitrator of the controversy between State and citizen (*Viuda e Hijos de Pedro P. Roxas vs. Rafferty*, 37 Phil., 957). But, in consenting to be sued and waiving its time-honored immunity to be sued, it may impose terms and conditions under which it will consent to be sued (*Murray vs. Wilson Distilling Co.*, 213 U. S., 151; 35 Law. ed., 742; *State vs. Mut. Life Ins., Co.* 175 Ind., 59).

Much can be said against the idea of hedging about the freedom of the citizen to go to the courts with a view to impugning the validity of the tax sought to be collected. The modern tendency is—and should perhaps be—towards liberality in permitting the citizens to appeal to courts to halt what may, not infrequently, be the excesses of the collecting officers of the government to the end that no person may be deprived of his property without due process of law or denied the equal protection of the laws. But it is political aphorism that courts cannot legislate however much they have already judicially legislated. When, therefore, the legislative department imposed (a) payment under protest and (b) decision of the Collector of Internal Revenue thereon as prerequisites to the bringing or institution of a suit for the refund or recovery of a tax alleged to have been illegally or improperly collected, it seems to me clear that this court, if it were to hold its ground and keep itself within the domain of its constitutional boundaries, cannot say that payment under protest is sufficient and that the other requirement is unnecessary. If the law is clear it must be given effect. There is no other alternative. Our inescapable obligation is to say what the law is and not what the law should be.

If, then, the Legislature, in the exercise of its legitimate authority has required payment under protest and decision of the Collector of Internal Revenue on that protest as conditions precedent to the bringing of an action for the recovery of a tax the courts can neither add to, nor eliminate any of, these conditions; and the least that can be said is, that this Supreme Court owes it to the coordinate branch of the government to abide by and respect its wisdom and should enforce the legislative will when called upon to do so in appropriate cases, unless the measure is found

to be repugnant to the fundamental law. It is almost trite to say now that the propriety and expediency of legislation is not a question for the courts to pass upon and determine. The power of taxation being legislative, all its incidents are within the control of the legislature. The remedies to be afforded the taxpayer, the mode and method to be pursued, and the conditions to be complied with, are matters within the discretion of the legislature, arid in respect to which its determination should be and is final. (*Genet vs. City of Brooklyn* [1885], 99 N. Y., 296, S06; 1 N. E., 777; *People ex rel. Hatch vs. Reardon* [1906], 184 N. Y., 431; 77 N. E., 970; 8 L. R. A. [N. S.], 314; 112 Am. St. Rep., 628; 6 Ann. Cas., 515; *People ex rel. Detroit & H. R. Co. vs. Salem* [1870], 20 Mich., 452; 4 Am. Rep., 400.) Under our constitutional system, the protection against unwise or oppressive legislation, within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people (*Cooley*, Const. Lim., 7th ed., ch. VII, 231). As vehemently expressed by Chief Justice Marshall, in *M'Culloch vs. State of Maryland*, supra, the only security against the abuse of the power of taxation is to be found in the structure of the government itself. "In imposing a tax, the Legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse." (See also, *Providence Bank vs. Billings and Pittman* [1830], 4 Pet., 514, 561; 7 Lawr ed., 939, 950.)

Viewed from the practical angle, it should be stated that the decision of the Collector of Internal Revenue is not necessarily final. Under our departmental organization (*Vide Acts Nos. 2666, 2803, 4007 and 4121*), continued in force by paragraph 1 of section 12, Article VII, of the Constitution, the Secretary of Finance has "direct control, direction, and supervision" over the Bureau of Internal Revenue, and "may, any provision of existing law to the contrary notwithstanding, repeal or modify the decisions" of the Collector of Internal Revenue "when advisable in the public interest" (sec. 79 [c], Revised Administrative Code). Administrative remedies should be exhausted before resorting to the courts. This is not saying, however, that in our case the taxpayer must first appeal to the Secretary of Finance before going to court, because such action is not required by section 1579, but this principle is here mentioned to indicate the practical consideration which was probably present in the mind of the legislator when he required the taxpayer's protest and the decision of the Collector of Internal Revenue on the protest as conditions precedent to the valid exercise of the taxpayer's right of action in a court of justice. The Secretary of Finance might reverse the action of the Collector of Internal Revenue, in which case, it would not be necessary to go to the courts. And, obviously enough, if there is no decision by the Collector of Internal Revenue no appeal could be taken therefrom to the department head. The object of the statute evidently is to give to the Collector of Internal Revenue an opportunity to decide whether in its judgment the tax is legal or illegal, and to the taxpayer a chance to recur to the Department of Finance in case of adverse decision of the collector, and thus save the delay and expense of litigation (*Vide Loomis vs. Wattles* [C. C. A. Neb., 1920], 266 Fed., 876).

With reference to the third cause of action, the evidence clearly shows that Hoc Chuan Tay was a branch of the plaintiff Wee Poco & Co., Inc. in Cotabato. My concurrence, however, is based furthermore on the fact that the Collector of Internal Revenue in this particular case was not certain of the tax he was collecting as indicated by his offer to return to the taxpayer the sum of P246.59 out of the total tax collected under the items comprised in the third cause of action.

CONCURRING ANG DISSENTING

IMPERIAL, J.,

I concur in the majority opinion in so far as it sustains the third cause of action of the plaintiff and reverses the appealed judgment with respect to the point in question; but I dissent from that part thereof dismissing the first two causes of action of the plaintiff, affirming, as a consequence, the judgment of the Court of First Instance.

I. My dissent is based on the interpretation given to section 1579 of the Revised Administrative Code, as amended by Act No. 3685, which reads as follows:

"When the validity of any tax is questioned, or its amount disputed, or other question raised as to liability therefor, the person against whom or against whose property the same is sought to be enforced shall pay the tax under instant protest, or upon protest within thirty days, and shall thereupon request the decision of the Collector of Internal Revenue. If the decision of the Collector of Internal Revenue is adverse, or if no decision is made by him within six months from the date when his decision was requested, the taxpayer may proceed, at any time within two years after the payment of the tax to bring an action against the Collector of Internal Revenue for the recovery without interest of the sum alleged to have been illegally collected, the process to be served upon him, upon the provincial treasurer, or upon the officer collecting the tax."

The majority opinion holds that, in connection with the first two causes of action, the plaintiff has made payment of the taxes demanded of him under protest, but concludes that both causes of action can not be maintained because the plaintiff did not request the refund or reimbursement of the taxes paid under protest. To arrive at this conclusion, it admits that section 1579 does not require such condition, but explains that the provision requiring the taxpayer to request the decision of the Collector of Internal Revenue is in effect equivalent to a demand for reimbursement required in some statutes of some States of the Union. I dissent from such interpretation. If the intention of the law had been different, the phraseology used in said provision would not have been couched as it appears in the text. On the contrary, the law, in prescribing that the taxpayer should request the decision of the Collector of Internal Revenue, evidently refers to the protest which is the act preceding the request for a decision. If the protest is of no value and need not be decided by said official, then what is the thing to be decided by him according to the law? This reasoning logically leads to the conclusion that it is the protest that assumes the role of the demand for refund required by some statutes of some States of the American Union as condition precedent to the filing of an action for the return of an illegally collected tax.

II. The protest filed by the plaintiff implicitly carried with it the demand on the Collector of Internal Revenue to decide the same. For this reason, it should be concluded that the plaintiff, in formulating his protest, substantially complied with the only two conditions precedent prescribed by section 1579, as amended. As was stated by the Supreme Court of Colorado in the case of the Board of County Commissioners of Arapahoe County vs. Cutter (3 Colo. Rep., 349, 351): "As the taxes were paid under protest no demand was necessary before bringing suit. The object of a demand is to give the party on whom it is made an opportunity to refund, without the expense incident to litigation, the taxes that had been illegally exacted. But where the taxes are paid under protest to the treasurer, who is armed by the law with authority to coerce payment, no further demand is required. Payment under such circumstances cannot be considered voluntary. The protest by the tax payer is of itself a notice to the treasurer that he regards the tax as illegal, and that he intends, if need be, to enforce his right by an appropriate proceeding."

III. The statutory provisions on taxes requiring conditions precedent to the filing of an ordinary civil action for the refund: of an illegally paid tax should be liberally construed by the courts to enable them to inquire into and determine the merits of the case (Connelly vs. City and County of San Francisco, 127 P., 834; Columbia Gaslight Co. vs. Mobley, 137 S. E., 211; 61 C. J., 994, sec. 1272).

For the foregoing reasons, I am of the opinion that the first two causes of action should have been passed upon and not rejected flatly merely for lack of the requisite referred to in the majority opinion. After considering the evidence of record, which, in my opinion, shows that the appellant was not bound to pay the taxes demanded, said two causes of action should be decided in favor of the plaintiff and the defendant should refund to it the sums of money collected illegally.

DIAZ, J.;

I concur in the dissenting opinion of Justice Imperial.

VILLA-REAL, J.;

I concur in the dissenting opinion of Justice Imperial.

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